**Nairobi Hospital v Master Power Systems Limited (Civil Appeal E107 of 2023)**
**[2024] KEHC 16705 (KLR) (Commercial and Tax) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16705 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL APPEAL E107 OF 2023**

**BM MUSYOKI, J**

**NOVEMBER 22, 2024**

**BETWEEN**

**THE NAIROBI HOSPITAL ..... APPELLANT**

**AND**

**MASTER POWER SYSTEMS LIMITED ..... RESPONDENT**

***(Being an appeal from ruling and orders of Honourable S.A. Opande (Mr.) (PM) dated 12-05-2023 in Chief Magistrate's Court at Milimani Commercial Courts civil case number E5199 of 2020)***

## JUDGMENT

1. The respondent brought a suit against the appellant in Chief Magistrate's court at milimani commercial courts vide civil case number E5199 of 2020 claiming a sum of Kshs 4,737,275.19 plus costs and interest. The respondent pleaded that on 23-09-2013, it had entered into a contract with the appellant for electrical installation on the appellant's facility on L.R. No 209/4209/1 upon which it proceeded to complete the works but the appellant failed to pay the full contract cost and interest. The appellant was served with summons to enter appearance but failed to appear or file defence upon which default judgment was entered against it on 21-06-2021.

2. On 30-08-2021, the respondent extracted decree and by warrants dated 8-09-2021 moved to execute following which the appellant filed an application in the dated 16th September 2021 in the trial court in which it sought the following orders.

    1. For reasons to be recorded this application be certified urgent, service thereof be dispensed with and the application be heard ex-parte in the first instance in respect of prayer 2 and 3 hereof.

    2. The honourable court be pleased to assign an urgent hearing date of the application herein.

3. Pending the hearing and determination of the application inter-partes or further orders of the court, an interim stay of execution of the decree issued herein dated 21st June 2021, and all consequential orders and warrants in execution thereof.

4. The decree dated 21st June 2021 and all consequential actions arising from the present suit be and are hereby set aside ex-dibito justitiae.

5. The honourable court be pleased to stay the present proceedings and refer the parties to arbitration, in accordance clause 31 of the agreement of sub-contract for building works and clause 45 of the agreement and conditions of contract for building works.

6. The costs of the application and any associated costs of the auctioneers be borne by the judgment creditor.

3. The trial court heard the application and proceeded to dismiss it prompting this appeal. The appellant has raised twelve long grounds of appeal which, in my opinion can be collapsed into three issues. In my understanding, the appellant has faulted the magistrate on the following grounds;

a. The trial court lacked jurisdiction over the suit pursuant to an arbitration agreement between the parties.

b. The respondent had withheld material facts from the court in that it did not disclose that there was an arbitration clause.

c. The decree was illegally obtained due to violation of Order 22 Rule 6 of the Civil Procedure Rules.

d. The warrants of attachment were illegal for failure to issue notice under Order 22 Rule 6 of the Civil Procedure Rules

4. This is a first appeal and this court is by law obligated to re-analyse, re-examine and reconsider the evidence produced before the trial court and come to its own independent conclusion. It is also notable that an application for setting aside default judgement is considered on the discretion of the court. Again, it is trite law that an appellate court would not interfere with discretion of a trial court unless the same was not exercised judiciously or the trial court made an error of principle. I will consider this appeal on the background of these legal principles.

5. Although prayer 3 of the application did not make sense, it is not in doubt that the prayers was for setting aside judgment which was entered in default of appearance and defence. The prayer for stay of proceedings and reference to arbitration could only be plausibly considered after the appellant was successful in the prayer for setting aside judgment. I agree with the magistrate's finding that he was functus officio and there was nothing to stay unless the judgment was first as set aside. In the circumstances I would deal with the prayer for setting aside before I consider the merits of the prayer for stay of proceedings.

6. The principles a court ought to consider in exercising its discretion in an application to set aside default judgment are well settled. A default judgment will be set aside as a matter of right if the same is found to have been irregular. An irregular judgement is that which should not have been entered in the first place for varied reasons ranging from an error in procedure or the law to an oversight or mistake. Example would be, where the court entered judgment before the time allowed by the law or summons or directions of the court had not lapsed or where the court had mistakenly believed or been misled to believe that the defendant was served and it turns out that he was not served. Secondly a regular judgement would be set aside where the defendant gives an acceptable explanation why it did not enter

appearance or file defence in time despite having been properly served. Thirdly, a default judgment could be set aside as a matter of discretion if the defendant demonstrates to the satisfaction of the court that it had a good defence to the claim even though it may have been served and lacked good explanation for failure to file defence. It is desirable that in the last two instances the plaintiff be compensated by way of costs or other remedies in order to balance interest and rights of the parties in the suit. It is however left to the discretion of the trial court to impose conditions on the applicant in allowing the application as it may think fit and appropriate in the circumstances.

7. In Yoosh Engineering Corporation v Aia Architects Limited (2023) KECA 872 (KLR) the Court of Appeal held that;

> 'Even where the judgment is regular, the court still retains the wide discretion to set the same aside though if the court decides to set aside the judgment, depending on the circumstances, it must do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing, the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgment and such conditions, if appropriate must be just to both the plaintiff and the defendant.'

8. The appellant in this matter should have fitted its case in any of the three scenarios for the trial court to exercise its discretion in its favour. In its ruling being appealed, the trial court was not convinced that the appellant deserved the order for setting aside of the default judgment. The court found that the appellant had been properly served and that the judgment was regular. I have gone through the record of appeal especially the supporting affidavit sworn on 15th September 2021 by one Maxwell Mwangi Maina on behalf of the appellant in support of its application to set aside the judgment and the replying affidavit sworn on 4th February 2022 by one Prakash Modashiya on behalf of the respondent in opposition to the same application. I notice that the appellant did not deny being served with summons to enter appearance. The trial court was therefore right in holding that the judgement was regular.

9. The trial court did not address itself on the issue of whether the appellant had demonstrated that it had a good defence to the claim perhaps because the appellant did not address it on that issue. The appellant did not make an attempt to explain the reasons why it did not enter appearance or file defence in time. All the appellant did was to narrate the origin of the contractual relationship between it and the respondent culminating to the suit then went to heavily rely on what he termed as arbitration clauses in the agreement between the parties. That is the same path the appellant has taken in this appeal. It has concentrated on telling this court and submitting at length the purport and meaning of the arbitration clause. The appellant holds the position that the respondent should have disclosed to the court that there was an arbitration clause at the time of filing the suit. I do not think that the respondent withheld this information. In its list of documents dated 18-08-2020, the respondent had attached the agreement between the parties which appears on pages 20 to 37 of the record of appeal. The said agreement contains the clause which the appellant is relying on.

10. On the other limb of whether or not the appellant had a good defence to the claim, it is clear to this court that, the appellant did not even make an attempt to demonstrate a defence to the claim. I note that there was no draft defence exhibited but I hold the view that an applicant can demonstrate a defence by way of an affidavit or any other pleading. It doesn't have to be in a draft defence but in this case, the appellant did not make any single averment in its supporting affidavit denying liability. The appellant did not state that the amount claimed by the respondent had either been paid or was not owing. It did not deny that the contract was entered into or make references to any breach by the respondent. In that regard, even though the trial court did not address itself on whether or not the

appellant had a good defence, this court finds that going by the pleadings and documents filed by the appellant, there was no demonstration that the appellant had a good defence to the suit.

11. I understand the appellant as saying that, since the agreement had an arbitration clause, the court lacked jurisdiction. I do not know of any provision of the law which divests the court of jurisdiction to entertain matters which were subject of arbitration. What the law provides is that a court of law may stay proceedings filed before it if it is satisfied on application by either of the parties that there existed an arbitration agreement and further the court is convinced that there existed a dispute between the parties. If indeed the court's jurisdiction was completely ousted in such proceedings, the *Arbitration Act* would have expressly provided that no court would try or entertain any suit whose subject matter was subject to an arbitration agreement. Arbitration is an alternative dispute resolution mechanism which supplements the court process once the parties opt to settle their disputes outside the courts of law.

12. Section 6(1) of the *Arbitration Act* provides that

    1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time which that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds;

        a. The arbitration agreement is null and void, inoperative or incapable of being performed; or

        b. That there is no fact in dispute between the parties with regard to the matters agreed to be referred to arbitration.'

13. In my opinion, this section of the law recognises that where parties do not approach the court for stay of proceedings, the court has jurisdiction to proceed with the trial. Once the proceedings take off and judgment is delivered or entered, the parties cannot come up and start asking for stay of execution as there is nothing to stay. I agree with the magistrate that there was nothing to stay, there having been a regular judgment which had not been set aside. The appellant was served with summons and instead of entering appearance, it sat pretty until judgment was entered against it and execution started. The purpose of setting aside judgement is to assist the parties who fail to appear or file defence as a result of a genuine mistake, human error and omission but not to assist a party who has deliberately sought to impede or obstruct fair dispensation of justice. In my analysis, the appellant falls in the square of a party who seeks to distract or obstruct justice.

14. The respondent has invited me to find that there is no dispute which is capable of being referred to arbitration. Although this is a valid point for consideration, I do not see the need to go into it because I have already held that there is nothing to be stayed since the proceedings ended up with a valid judgment of the court. Unless the judgment is set aside, it will be an academic exercise for me to delve into the issue of whether or not the matter is fit for referral to arbitration.

15. The appellant has claimed that the decree was irregularly drawn against provision of Order 21 Rule 8 of the Civil Procedure Rules. The appellant's problem with the decree is that a draft was not sent to them for approval, amendment or rejection. It is noteworthy that the appellant had not participated in the prosecution of the suit. It is my opinion that the objective of the procedure provided in the said Rule is to prevent instances where the terms of the decree as drawn are not in agreement with the judgement of the court and that is why subrule 4 of the same provides for the procedure to be followed where the parties are not in agreement in respect of the draft decree. Even in instances where the parties are in agreement, the Registrar or the court which heard the matter has the final say on the terms of the decree.

16. On the basis of the above, I do not think that failure to comply with the procedure of drafting decree as provided for in Order 21 Rule 8 is a ground for setting aside a regular judgment. If there was a breach of the process, the remedy thereof would be to recall the decree and draw a fresh one. In this matter, the appellant has not pointed out to this court what problem it has with the decree as finally drawn other than the process of drawing the same. In any event, I take position that, a party who has not participated in the suit has no right to be supplied with a draft decree for their approval, amendment or comments. In holding so, I am in total agreement with the holding of Honourable Justice Stella Ruto in Omondi & 3 Others v English Press Limited (2022) KEELRC 13508 (KLR) where she held that;

> 'The main contest revolves around Order 21 Rule 8(2). A plain reading of the said provision reveals that the same is not cast in mandatory terms. In my view, the mischief sought to be cured through the said provision is to ensure that decrees are in consonance with the Judgment of the Court.
>
> In the instant case, the Applicant has not indicated or suggested that the decree is at variance with the Judgment of the Court. I have had the occasion to peruse the said decree and note that it accords with the Judgment of the Court.
>
> As I see it, the Applicant's only contention appears to be the manner in which the decree was extracted, and not its substance.....
>
> I am therefore of the view that failure by the Claimants to forward a draft copy of the decree to the Applicant is a procedural issue and is not save to stay the execution proceedings.'

17. In Eco Bank Ltd v Elsek (Kenya) Limited & 3 Others (2015) eKLR Honourable Justice Mary Kasango held that;

> 'Order 21 Rule 8(2) (3) and (4) of the Procedure Rules set out the steps to be followed when a decree is drawn. Under sub rule (2) of that order it requires a draft decree be sent to the opposite party for approval. If it is approved and the registrar of the High Court is satisfied that it is drawn up in accordance with the court's judgment, the registrar shall sign and seal the decree. Subrule (3) provides that where the opposite party fails to approve the draft decree within seven days of delivery, the registrar on being notified of that failure shall sign and seal it once he confirms that it conforms to the judgement.
>
> The plaintiff has not denied it did not forward the draft decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to setting aside of the execution if the decree was shown not to conform to the judgement.'

18. The appellant has argued further that the respondent had in the process of execution of the decree violated provisions of Order 22 Rule 6 which provides that;

> 'Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 Appendix A:
>
> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of entry of judgment has been given to him either at his address for service

or served on him personally; and a copy of that notice shall be filed with the first application for execution.'

19. The respondent has not given any response to the allegation by the appellant that the process of execution violated provisions of Order 22 Rule 6 by failing to give a notice of judgment before processing the warrants. If no notice was given to the appellant, which is apparently the case, then the warrants were unprocedurally and improperly issued and should be recalled. It should however be noted that, the proviso to the Rule is meant to give the defendant who may not be aware of the stage or status of the proceedings notice of intended execution so that he may not be taken by surprise. In Langer v Mutambu & Another (2023) KEHC 25372 (KLR) it was held that;

> 'Regarding the defendants' argument that notice of entry of judgment was not served, the defendants must had in mind Order 22 rule 6 which states that where judgment 'in default of appearance or defence' has been entered against a defendant, no execution by payment, attachment or eviction should issue unless a notice of not less than ten days of the entry of judgement has been served on him personally, and a copy of that notice is filed with the first application for execution.
>
> It is plain from the rule that the notice is to be served where judgment is entered in default of appearance and defence. The rationale for requirement of service of a notice is to make the defendant aware of entry of judgment against him and the impeding execution so that to obviate being taken by surprise. The defendant may take steps to challenge the default judgment in the event he disputes service of summons or even opt to pay to avert the impeding execution.'

20. According to the appellant, it became aware of the judgment on 8-09-2021 when the respondent's appointed auctioneers visited its premises and proclaimed its assets. This is more than three years ago and the appellant can now be said to have the notice of the judgment against it. In the circumstances, the mischief meant to be avoided by that Rule has been avoided since execution was stopped by an order of the trial court and later by this court's order dated 8-06-2023. The appellant has had the opportunity to challenge the judgment and the purpose of the notice has been served and overtaken by events. The only remedy for this violation is that the appellant cannot be condemned to pay costs associated with the irregular execution but that irregularity cannot be, in my view, a basis of setting aside the default judgement.

21. It is my conclusion therefore that in view of the above analysis, this appeal lacks merits save for the position that the execution was irregular commenced and I proceed to make the following orders;

    a. The execution by warrants of attachment and sale dated 8-09-2021 in the trial court is hereby unconditionally lifted.

    b. The rest of the appeal is hereby dismissed.

    c. The appellant shall pay the costs of this appeal.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered online in presence of:

Miss Nadongo holding brief for Miss Luther for the respondent; and absence of counsel for the respondent.